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ALEXANDER L. STEVAS,
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No. 83-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

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Date: OCT 27 1983

QUESTION PRESENTED

Whether tracks to be built for Respondent Missouri Pacific Railroad Company's switching yard, which will be built adjacent to Respondent's pre-existing line, will be used only for storage, switching, and classification of rail cars, and will be merely incidental to line-haul transportation and will *not* directly serve any rail customer, or extend into new territory, or be used as a part of the actual line-haul transportation from shipper to receiver, or invade the territory of another railroad, fall within the "switching, or side tracks" exception from ICC regulation under 49 U.S.C. 10907(b)(1 and do not constitute an "extension to any of its railroad lines" or an "additional railroad line" for which prior authorization by the ICC is required under section 10901(a).

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Court.

Respondent Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. The following companies are also subsidiaries of Union Pacific Corporation and are thus affiliates of Missouri Pacific Railroad Company: Union Pacific Railroad Company, Champlin Petroleum Company, Rocky Mountain Energy Company, and Upland Industries Corporation.

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BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The decision by the United States Court of Appeals for the District of Columbia Circuit, reproduced as Appendix ("App.") A hereto, is reported as *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983). In that decision the court affirmed a February 11, 1982, decision of the Interstate Commerce Commission ("Commission") in Finance Docket No. 29657, reported as *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69 (1982). That Commission decision, reproduced as App. B hereto, in turn affirmed an August 28, 1981, decision of the Commission's Review Board No. 3. The

decision rendered by Review Board No. 3 is reproduced in App. C hereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Three statutory provisions are involved in this case.

49 U.S.C. § 10901(a) (Supp. V 1981) provides:

> *§ 10901. Authorizing construction and operation of railroad lines*
>
> (a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may —
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) acquire or operate an extended or additional railroad line; or
>
> (4) provide transportation over, or by means of, an extended or additional railroad line;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

49 U.S.C. § 10102(19) (Supp. V 1981) states as follows:

> *§ 10102. Definitions*
>
> In this subtitle —
>
> • • •

(19) "railroad" includes —

(A) a bridge, car float, lighter, and ferry used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10907(b) (Supp. V 1981) provides:

§ *10907. Exceptions*

• • •

(b) The Commission does not have authority under sections 10901-10906 of this title over —

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

STATEMENT OF THE CASE

Petitioner Jerry K. Nicholson ("Nicholson") owns land in Pointe Coupee Parish in Louisiana. Since before the turn of the century, one of Missouri Pacific Railroad Company's ("MoPac") lines, has run across and bisected the eastern portion of Nicholson's land.

MoPac desires to build a switching yard adjacent to its line, but such a switching yard required the acquisition of land owned by four persons or groups, including Nicholson. The switching yard will cover a total of approximately 550 acres, about 300 of which were a part of Nicholson's

property. The new switching yard will not directly serve any shipper or receiver and will be used only for storage, switching, and classification (i.e., the sorting of cars by switching them into rational groups or "blocks") of cars. The MoPac's existing line will continue to handle through transportation. No other railroad is located anywhere near the yard site, and Nicholson does not allege that the new yard will invade the territory of another railroad.

Upon the failure to come to terms with Nicholson on the purchase of land necessary for the switching yard, the MoPac filed expropriation proceedings, which is the terminology used in Louisiana for eminent domain proceedings, in the Eighteenth Judicial District Court for the Parish of Pointe Coupee. Judgment has been rendered for MoPac in that case, and Nicholson's appeal of that judgment is currently pending.

Nicholson's resistance to the construction of the switching yard was not confined to the expropriation proceedings. Nicholson instituted the instant action by filing a complaint with the Interstate Commerce Commission, alleging that the expropriation proceedings filed by MoPac constituted construction of "an extension to any of its railroad lines," or "an additional railroad line" within the meaning of 49 U.S.C. §10901(a) (Supp. V 1981), for which a certificate of public convenience and necessity from the ICC would be required. Nicholson[1] requested that the MoPac be ordered to cease and desist from taking any further action concerning the yard.

In a decision (App. C, *infra* pp. 23a-25a) dated August 28, 1981, a Commission Review Board dismissed the complaint, finding that since a decision in the expropriation proceedings had not yet been rendered, the complaint was

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[1] Several other landowners joined in Nicholson's complaint, but they all subsequently sold their land to the MoPac and are not involved in the instant proceedings.

not ripe for review. Upon appeal by Nicholson, the Commission affirmed the dismissal of Nicholson's complaint, but on different grounds. *Nicholson v. Missouri Pacific Railroad*, 366 I.C.C. 69 (1982); App. B, *infra* pp. 14a-22a. The Commission found the complaint ripe for review, but also found that the switching yard was not "an extension to any of [MoPac's] railroad lines," nor "an additional railroad line," but was, instead, within the "switching, or side tracks" exception of 49 U.S.C. § 10907(b) (Supp. V 1981). After observing that the Commission has had authority over the construction of extensions of line or additional lines since 1920,[2] but that neither the Commission nor any court has ever considered the construction of a switching yard to be an extension of line or additional line, the Commission noted:

> [T]he proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. [Cit. omitted.] MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation [footnote omitted].

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[2] 49 U.S.C. § 10901(a) (Supp. V 1981) is a recodification of the former 49 U.S.C. § 1(18), and 49 U.S.C. § 10907(b) (Supp. V 1981) is a recodification of the former 49 U.S.C. § 1(22). The old sections 1(18) and 1(22) were added to the Interstate Commerce Act by § 402 of the Transportation Act of 1920, 41 Stat. 456, 476-78.

Nicholson v. Missouri Pacific Railroad, 366 I.C.C. 69, 73-74 (1982); App. B, *infra* p. 21a.

The Commission therefore upheld the dismissal of Nicholson's complaint, whereupon Nicholson sought review by the United States Court of Appeals for the District of Columbia. MoPac intervened. Nicholson's instant petition for writ of certiorari seeks review of the Court of Appeal's decision, *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983); App. A, *infra* pp. 1a-13a, that upheld the Commission. After observing that the distinction between "lines" requiring Commission approval and excepted "switching, or side tracks" "turns on the intended use of the track segment, not on the label or cost of the segment," *Nicholson v. ICC*, 711 F.2d at 367; App. A, *infra* p. 7a, the Court of Appeals held:

> The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destination; the classification yard will be *incidental* to the operation of trains over that track.

Nicholson v. ICC, 711 F.2d at 368; App. A, *infra* at p. 9a (emphasis in original).

THERE ARE NO VALID REASONS FOR GRANTING A WRIT

Nicholson's assertions notwithstanding, the instant case clearly does not involve an attempt by the ICC to "deregulate" the construction of switching yards. Simply stated, the ICC has never attempted to regulate the construction of switching yards because the ICC has never had the authority to regulate such railroad activity. It is beyond dispute that the purpose and function of the tracks to be built for the yard at issue are the same as any and all other "switching, or side tracks" excepted from ICC regulation by 49 U.S.C. § 10907(b)(1) (Supp. V 1981): i.e., the switching and storage of cars. Nicholson vainly seeks to avoid the "switching, or side tracks" exception of § 10907(b)(1) by referring to the yard as a "classification yard," rather than a switching yard, but the two are synonymous: to "classify" cars means to sort the cars by switching them into rational groups or blocks. Every classification track is a switching track, and all "switching, or side tracks" are excepted from ICC regulation by section 10907(b)(1).

I.

THE TRACKS TO BE BUILT FOR THE SWITCHING YARD HAVE NONE OF THE HALLMARKS OF "RAILROAD LINES" AND ARE CLEARLY "SWITCHING, OR SIDE TRACKS" EXCEPTED FROM ICC REGULATION UNDER SECTION 10907(b)

Section 10901(a) of the recodified Interstate Commerce Act provides, in pertinent part, that a rail carrier subject to the Act must first secure the authorization of the ICC before it may— "(1) construct an extension to any of its railroad *lines*; [or] (2) construct an additional railroad *line*."[3] By contrast, section 10907(b)(1) of the Act makes

[3] 49 U.S.C. § 10901(a) (Supp. V 1981) (emphasis added).

it clear that: "The Commission does not have authority under sections 10901-10906 of this title over — (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching, or side tracks* if the tracks are located, or intended to be located, entirely in one State."[4]

Nicholson argues that since the definition of "railroad" in 49 U.S.C. § 10102(19) (Supp. V 1981), in the definitions section of the recodified Act includes "yard," then the tracks to be built for the switching yard are necessarily "railroad lines," rather than "switching, or side tracks." In so arguing, Nicholson overlooks the fact that the distinction made in the statutes is not between that which is railroad and that which is not railroad, but between "lines" of railroad[5] and "switching, or side tracks." To say that the tracks to be built for a switching yard are a part of a "railroad" is not to say that they are "railroad lines," or, to use the pre-recodification language, "lines of railroad."

Nicholson's insistence that "lines" be read out of section 10901(a), and only "railroad" be given effect, proves too much. The definition of "railroad" in section 10102(19) also includes "ground," but "ground" is not expressly excepted in section 10907(b), so under Nicholson's rationale, the purchase of or construction on "ground" is

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[4] 49 U.S.C. § 10907(b)(1) (Supp. V 1981) (emphasis added).

[5] 49 U.S.C. § 10901(a) (Supp. V 1981) is a recodification without substantive change, *see* Pub. L. No. 95-473, § 3(a), 92 Stat. 1337 (1978), of the old 49 U.S.C. § 1(18), which provided in pertinent part: "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, . . . unless and until there shall first have been obtained from the Commission a certificate . . ." While the recodification was an admirable accomplishment, the old § 1(18)'s "line of railroad" perhaps made the intended focus of attention slightly more obvious than in its recodified form of "railroad line" in the new § 10901(a).

necessarily a "railroad line" which must be first authorized by the ICC. As the ICC noted:

> This argument does not withstand scrutiny; it would imply for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."[6]

Nicholson mistakenly suggests that because the yard in question is to be a "classification yard," something significantly different from or in addition to switching is involved.[7] "Classification" of cars, however, simply means to sort the cars by switching them into rational groups or blocks. A classification yard is a switching yard, and every classification track is a switching track.

There is, in fact, no real dispute that the use of the tracks to be built will be the same as for any and all other "switching, or side tracks." Indeed, Nicholson does not challenge the fundamental findings of fact by the ICC that:

> [T]he proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are lo-

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[6] Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 72 n.5; App. B, *infra* p. 19a n.5.

[7] *See* Petition of Nicholson for Writ of Certiorari at 11 n.9, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983) ("Missouri Pacific's proposed classification yard is distinguishable readily; it will involve far more than switching."); *see also id.* at 12 ("Thus, the facts that Missouri Pacific's proposed classification yard . . . will be used *in part* for switching . . . .") (emphasis in original).

> cated in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. [Cit. omitted.][8]

Nicholson concedes that the "proposed classification yard will not be part of the railroad's main line track, [and] will not extend the railroad's service into any new territory."[9] Further, Nicholson does not challenge the finding made by the ICC[10] and upheld by the court of appeals[11] that the operations at the yard will be only incidental to line-haul transportation. Since it is not disputed that the yard will be merely incidental to line-haul transportation and be used only for storage, switching, and classification, and will not directly serve any rail customer, extend into

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[8] Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 73-74; App. B, *infra* p. 21a.

The court of appeals also found:

> The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track.

Nicholson v. ICC, 711 F.2d 364, 368 (D.C. Cir. 1983); App. A, *infra* p. 9a (emphasis in original).

[9] Petition of Nicholson for Writ of Certiorari at 12, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

[10] *See* Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 74; App. B, *infra* p. 21a.

[11] *See* Nicholson v. ICC, 711 F.2d at 368 & 369; App. A, *infra* pp. 9a & 12a.

new territory, or be used as a part of the actual transportation haul from shipper to receiver, there is no basis to question the holding of the court of appeals that the tracks to be built are "switching, or side tracks" and have none of the hallmarks of "railroad lines" or "lines of railroad."

Nicholson argues that merely because the tracks to be built for the switching yard will cost a substantial amount of money, those tracks must be deemed to be "railroad lines." Section 10901(a), however, does not so provide. There is certainly no basis in the statute or in common sense for transforming a switching yard into a "railroad line" or "line or railroad" simply because it will cost a substantial amount of money. Far more money was spent on the MoPac's state of the art computer system than will ever be spent on the switching yard in question, but that does not make a computer system a "railroad line". Similarly, the substantial amount of the money to be spent on building the tracks for the switching yard does not transform those "switching, or side tracks" into "railroad lines" or "lines of railroad."

Lastly, Nicholson argues that because the tracks to be built for the switching yard will help the MoPac to provide more efficient service and, as a result, will likely induce potential shippers to ship via MoPac, these switching tracks become "railroad lines" or "lines of railroad." But the mere fact that the new yard will improve service and consequently increase MoPac's business hardly turns "switching, or side tracks" into "railroad lines" or "lines of railroad." Indeed, *all* of the tracks excepted under section 10907(b) — "spur, industrial, team, switching, or side tracks" — are intended to improve rail service.

II.

THE DECISION BELOW IS SQUARELY IN LINE WITH THE ADMINISTRATIVE AND JUDICIAL PRINCIPLES AND DECISIONS THAT HAVE BEEN FOLLOWED FOR OVER SIXTY YEARS

Petitioner Nicholson attempts to argue that the instant case "is one of first impression,"[12] but in reality, the law in this area has been well-established for decades. In *Georgia Southern and Florida Railway v. Duval Connecting Railroad*,[13] for example, a railroad had to resort to condemnation for some of the land that it needed for a new classification and switching yard. One of the remaining parcels was owned by a competitor railroad, the Georgia Southern, which filed suit to enjoin the condemnation on the grounds that ICC approval for the yard was required under the predecessor to the present section 10901(a), the old section 1(18).[14] Nicholson suggests that the classification yard in *Georgia Southern* "*may* have had very different characteristics from Missouri Pacific's proposed classification yard,"[15] but examination of that opinion shows how similar the situation there was to the instant case. The yard in *Georgia Southern* was a classification yard, just as the yard in question here is; moreover, at about five miles in length, it was actually about a mile and one-half longer than the yard in question here. Furthermore, the yard in *Georgia Southern* was estimated to cost about $20,000,000 in 1963 dollars, which was also a substantial amount of money. Like the court of appeals below,

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[12] Petition of Nicholson for Writ of Certiorari at 9, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

[13] 324 F.2d 801 (5th Cir. 1963) (per curiam).

[14] Former 49 U.S.C. § 1(18), now recodified without substantive change at 49 U.S.C. § 10901 (Supp. V 1981).

[15] Petition of Nicholson for Writ of Certiorari at 10 n.8, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983) (emphasis added).

the *Georgia Southern* Court had no trouble in finding that the yard there was not an "additional line" or an "extension" of a line of railroad.[16] Previous ICC decisions that have addressed the question are also in accord.[17]

Nicholson asserts that "The court of appeals has announced a new principle of federal law — that 'track segments which are merely incidental to, *and not required for*, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).' 711 F.2d at 368."[18] Petitioner's contention is unconvincing because the court's observation was simply an echo of the distinction made some sixty years ago in *Detroit & Mackinac Railway v. Boyne City, Gaylord & Alpena Railroad*,[19] and reaffirmed some seventeen years ago in *New Orleans Terminal v. Spencer*.[20]

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[16] *See* Georgia S. & F. Ry. v. Duval Connecting R.R., 324 F.2d at 802. *See also, e.g.*, Louisiana & Ark. Ry. v. Missouri Pac. R.R., 415 F.2d 751, 752 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970) (track that had been used only for switching and served only one industry held to be spur and switching track excepted from ICC regulation under the old § 1(18)).

[17] *See, e.g.*, Terminal Ry. Ala. State Docks – Operation, Mobile, Ala., 354 I.C.C. 747, 749 (1978) (purchase of tracks to be used "as a switching yard and to furnish connection terminal switching" held to be a transaction excepted from regulation under the old § 1(18)); *see also* Oregon-Wash. R.R. & Nav. Co. Constr., 275 I.C.C. 591, 598 (1950) (a new yard was to be built in connection with an application to abandon an old line and construct a new line; ICC noted that construction of the new yard was not subject to ICC regulation), *cited with approval in* Boston Term. Co. Reorg., 312 I.C.C. 373, 378 (1960).

[18] Petition of Nicholson for Writ of Certiorari at 12, Nicholson v. ICC, No. 83-533, (U.S. Sept. 28, 1983) (emphasis added by Nicholson).

[19] 286 F. 540, 546 (E.D. Mich. 1923).

[20] 366 F.2d 160, 166 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967).

The court of appeals opinion does not turn on the "and not required for" language that appears once in the opinion, but instead is clearly based on the undisputed facts that the yard is merely incidental to line-haul transportation and will be used only for storage, switching, and classification, and will *not* directly serve any rail customer, extend into new territory, or be used as a part of the actual line-haul transportation from shipper to receiver.

Petitioner's reliance on *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway*[21] and *Railroad Commission v. Southern Pacific*,[22] which are discussed in the opinion of the court of appeals, is misplaced. Those precedents are easily distinguishable on their facts from the case at hand. In *Texas & Pacific*, the T&P filed suit because the Santa Fe was attempting to build trackage that not only extended into territory not theretofore served by the Santa Fe, but extended into territory already served by the T&P.[23] This Court properly held the Santa Fe's trackage to be an extension of its line. In *Southern Pacific*, the State Railroad Commission had ordered the SP and two other railroads to abandon their separate passenger stations, and their separate lines to those stations, and to build one combined passenger terminal and to construct new lines to that new terminal. This Court not surprisingly found that such actions required the prior approval of the ICC under the predecessor to the present section 10901(a), the old section 1(18). Unlike those cases, the dispute involved here plainly does not involve the construction of new lines.

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[21] 270 U.S. 266 (1926).

[22] 264 U.S. 331 (1924).

[23] *See* 270 U.S. at 278.

III.

THE DECISION BELOW IS NOT A SUB ROSA ATTEMPT TO DEREGULATE, BUT IS SIMPLY A REAFFIRMANCE THAT FOR OVER SIXTY YEARS, SECTION 10907(B) AND ITS PREDECESSOR HAVE EXCEPTED FROM ICC REGULATION "SWITCHING, OR SIDE TRACKS"

Petitioner Nicholson declares that "[w]hat the Commission has done, with the court's concurrence, is to 'deregulate' the construction of railroad classification yards.[24] That argument is without merit. The ICC has never had authority to regulate the construction of switching yards and has never attempted to do so. The Commission decision below is not a *sub rosa* attempt to deregulate, but simply a reaffirmance of what the ICC and the courts have held for over sixty years: "switching, or side tracks" are excepted from ICC regulation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[24] Petition of Nicholson for Writ of Certiorari at 7, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

CERTIFICATE OF SERVICE

I, John P. Legendre, hereby certify that on this 27th day of October, 1983, I have served three (3) copies of the foregoing Brief for Respondent Missouri Pacific Railroad Company in Opposition on each of the counsel for all parties of record by depositing same in a United States post office or mailbox, with first-class postage prepaid, addressed as follows:

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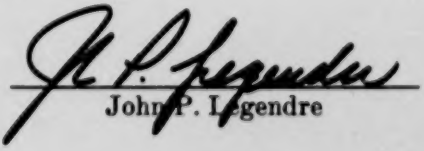
Interstate Commerce Commission
Washington, D.C. 20423



John P. Legendre

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1428

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,
INTERVENORS

Petition for Review of an Order of the
Interstate Commerce Commission

Argued January 10, 1983

Decided June 30, 1983

Fritz R. Kahn, for petitioner and intervenor, Louisiana Soybean Association.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *John Broadley,* General Counsel, *Ellen D. Hanson,* Associate General Counsel, Interstate Commerce Commission, *John P. Powers, III*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and *Kenneth P. Kolson*, Attorneys, U.S. Department of Justice, were on the brief, for respondents.

John P. Legendre, for intervenor, Missouri Pacific Railroad Company.

John J. Rademacher, was on the brief for American Farm Bureau Federation, Amicus Curiae, urging that the order under review herein be vacated.

Henry H. Bernard, Jr., was on the brief for Louisiana Farm Bureau Federation, Inc., Amicus Curiae, urging that the order under review herein be vacated.

James I. Collier, Jr., was on the brief for Association of American Railroads, Amicus Curiae, urging affirmance.

Before: ROBINSON, *Chief Judge*, WALD, *Circuit Judge*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: Petitioner, Jerry K. Nicholson, challenges an order of the Interstate Commerce Commission (Commission) which dismissed his complaint alleging that the Missouri Pacific Railroad Co. (Missouri Pacific) had violated the Interstate Commerce Act, 49 U.S.C. § 10901(a) (Supp. V 1981),[1] by attempt-

[1] 49 U.S.C. § 10901(a) (Supp. V. 1981) provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may –
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> (1) construct an extension to any of its railroad lines;
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> (2) construct an additional railroad line;
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> (3) acquire or operate an extended or additional railroad line; or
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> (4) provide transportation over, or by means of, an extended or additional railroad line;
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> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

ing to build a railroad line — to wit, a classification yard adjacent to its main-line track in Pointe Coupee Parish, Louisiana — on his land without a finding by the Commission of public convenience and necessity. The Commission ruled that the classification yard was not a "railroad line" requiring the approval called for by section 10901 (a), but rather was a switching track excepted from Commission jurisdiction by 49 U.S.C. § 10907(b)(1) (Supp. V 1981).[2] *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69, 72-74 (1982). Because well-established judicial and Commission precedent compel the conclusion that the proposed Missouri Pacific classification yard is not a "railroad line" requiring Commission approval, we affirm the Commission's order.

I.

Petitioner owns farmland in Pointe Coupee Parish, Louisiana, on which he grows soybeans and other crops. Missouri Pacific presently owns a right-of-way over petitioner's land for the operation of a single-line track of railroad, but wishes to construct a classification yard adjacent to its track on petitioner's land. The numerous tracks in the yard will be used to switch cars in the making up and breaking up of freight trains, to arrange cars of trains in delivery order, and to sort cars in trains by types of cars or contents preparatory to train movement.[3] As a public utility, Missouri Pacific has filed

[2] 49 U.S.C. § 10907(b) (Supp. V 1981) (emphasis added) provides:

> The Commission does *not* have authority under sections 10901-10906 of this title over –
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> (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching*, or side tracks if the tracks are located, or intended to be located, entirely in one State . . . .

[3] The proposed classification yard will be approximately 3.5 miles long and 0.5 miles wide, will cover approximately 550

an action under state law in Louisiana state court to acquire by condemnation the necessary portion of petitioner's land. *Missouri Pacific R.R. v. Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981).

Petitioner[4] filed a complaint with the Commission seeking a cease and desist order to prevent Missouri Pacific from taking any steps to construct the classification yard without Commission approval pursuant to section 10901 (a).[5] Petitioner contended that the classification yard would be "an additional railroad line" requiring the Commission's prior approval and that the Commission had not made the findings required by the statute. 49 U.S.C. § 10901(a) (Supp. V 1981). A Commission Review Board dismissed the complaint because it was not ripe for review. The Review Board reasoned that a "civil decision against [Missouri Pacific] may totally moot the issue of whether Commission approval of [Missouri Pacific's] construction is required." *Nicholson v. Missouri Pacific R.R.*, Finance Docket No. 29657, slip op. at 2 (Sept. 15, 1981). On appeal, the Commission affirmed the dismissal of petitioner's complaint, although on different grounds. *Nicholson v. Missouri Pacific R.R., supra*, 366 I.C.C. at 69.

The Commission found that the complaint was ripe for review because petitioner had demonstrated "a substantial probability that if the Commission waits, [petitioner] would be harmed by the challenged conduct before the Commission could determine its legality." *Id.* at 72. However, the Commission also found that the operations

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acres, and will consist of over 100 miles of track. The facility will cost Missouri Pacific approximately $75 million.

[4] Several other affected landowners joined in petitioner's complaint, but all have subsequently sold their land to Missouri Pacific and are not parties to this appeal. Brief for Intervenor, Missouri Pacific Railroad Co., at 3.

[5] *See* note 1 *supra*.

which would be performed at the classification yard would be *incidental* to main-line transportation and that such transportation would continue over Missouri Pacific's existing track. Noting that it had consistently held yards exempt from its jurisdiction under section 10907(b),[6] and had never authorized the construction of a classification yard, the Commission ruled that the proposed classification yard was not a railroad line requiring approval pursuant to section 10901(a). *Id.* at 72-74. This petition for review followed.

II.

Petitioner contends that the Commission erred in concluding that construction of the proposed classification yard did not require its approval.[7] Petitioner argues that

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[6] *See* note 2 *supra.*

[7] Petitioner also raises several frivolous procedural arguments in his petition for review. Petitioner asserts that the Commission erred in denying the requests of the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation to intervene in the Commission proceeding. However, the Commission properly concluded that these organizations sought

> intervention to present testimony *if the Commission holds a hearing* on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dimissing the complaint [for lack of jurisdiction over the proposed construction], no purpose would be served in permitting these parties to intervene.

Nicholson v. Missouri Pacific R.R., *supra*, 366 I.C.C. at 69 n.2 (emphasis added). We find, in any event, that the clarity of the legal principles mandating our affirmance of the Commission's order obviates remand for purposes of intervention by these parties.

Next petitioner contends that the Commission's decision was improper because only two Commissioners of the three Commissioner Division assigned to consider his complaint participated in that decision – one Commissioner would have participated only in the event of a tie. *See id.* at 74. The simple response to this argument is that the Interstate Commerce Act provides that the Commission

because section 10102(19) of the Interstate Commerce Act defines *"railroad"* to include "yard,"[8] the Act's requirement that Commission authorization be received prior to construction of *"railroad* lines" necessarily encompasses construction of "yards." Petitioner also argues that because the proposed classification yard will cost $75 million, the substantiality of the cost requires the Com-

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may carry out its duties in Divisions consisting of three Commissioners, 49 U.S.C. §§ 10302(a), 10305 (Supp. V 1981), and that a majority of a Division is a quorum for the transaction of business. *Id.* § 10306(a). Since a quorum of the assigned Division dismissed petitioner's complaint, its decision was valid. Northern Valley Transfer, Inc. v. ICC, 192 F. Supp. 600, 603 (D.N.J. 1961).

Finally, petitioner asserts that the decision was improper because the Commission was "politically imbalanced" at the time it was rendered; at that time the Commission consisted of three Republicans and one Democrat. However, petitioner concedes, as he must, that nothing in the Interstate Commerce Act requires a Division of the Commission to be politically balanced. Brief for Petitioner at 31. Thus petitioner can assert no injury as a result of the composition of the Commission since his complaint could have been assigned to a Division of the same Commissioners even if the Commission had consisted of a full contingent of eleven Commissioners, six from one party and five from the other. *See* 49 U.S.C. § 10301(b) (Supp. V 1981). Petitioner's real grievance with respect to the composition of the Commission lies with the President and the Senate, who failed to appoint and confirm additional Commissioners, and not with the validly appointed Commissioners who then composed the Commission. Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 474-75 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). The Act authorizes those Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission. 49 U.S.C. § 10301(e) (Supp. V 1981).

[8] 49 U.S.C. § 10102(19) (Supp. V 1981) (emphasis added) provides:

> "railroad" includes –
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> . . . .
>
> (C) a switch, spur, track, terminal, terminal facility, and freight depot, *yard*, and ground, used or necessary for transportation.

mission to rule upon the project prior to its construction. We find these arguments to be without merit.

It is well established that the determination of whether a particular track segment is a "railroad line," requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to section 10907(b),[9] turns on the intended use of the track segment, not on the label or cost of the segment. It was held early on that

> it is sufficiently plain, from a consideration of not only the obvious purpose prompting the [Interstate Commerce Act[10]] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of* [*section 1(18)*] so-called main or branch lines of railroad, that is, *lines*

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[9] Congress first codified the provisions of the Interstate Commerce Act in 1978. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 Prior to that time the provisions of sections 10901 and 10907 were found at section 1(18) of the Act. Insofar as is relevant to this case, the codification made no substantive changes in these provisions. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 n.7 (1981).

[10] The court indicated that the purpose of Congress in enacting the Interstate Commerce Act was,

> as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, . . . "to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay."

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 545 (E.D. Mich. 1923).

> *designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude* from the operation of the statute *all that mass of "tracks"* (as distinguished from "lines") naturally and necessarily *designed and used for* loading, unloading, *switching,* and other *purposes connected with, and incidental to,* but not actually and directly used for, *such transportation service.*

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923) (emphasis added).[11] Shortly thereafter, the Supreme Court held that

> [*i*]*f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad* within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (emphasis added). Thus it can be seen that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Com-

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[11] *Accord* New Orleans Terminal Co. v. Spencer, 386 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (emphasis added) ("If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof . . . .' If, however, the trackage is used in the loading, reloading, storage and switching of cars *incidental* to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction").

mission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).[12]

Application of these principles to Missouri Pacific's proposed classification yard compels the conclusion that construction of the Pointe Coupee Classification Yard is not the construction of a "railroad line" requiring Commission approval pursuant to section 10901(a). The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track. Accordingly, construction of the classification yard is exempted from Commission jurisdiction by section 10907(b).

Support for this conclusion is found in a decision of the Fifth Circuit which held, without explanation, that

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[12] That a track segment is or is not identified as a "spur, industrial, team, switching, or side" track is not determinative or whether it is exempted by section 10907(b) from Commission jurisdiction. *See, e.g.*, Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 274-79 (track segment identified as "industrial" track held to require Commission approval pursuant to section 1(18)); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (track segment identified as "side" track held to require Commission approval pursuant to section 1(18)); Georgia S. & Fla. Ry. v. Duval Connection R.R., 324 F.2d 801, 802 (5th Cir. 1963) (per curiam) (track segment identified as "yard" track held not to require Commission approval pursuant to section 1(18)).

Commission approval pursuant to section 1(18) of the Interstate Commerce Act[13] was not required prior to the construction of a classification yard. *Georgia S. & Fla. Ry. v. Duval Connecting R.R.*, 324 F.2d 801, 802 (5th Cir. 1963) (per curiam). Furthermore, the Commission has consistently interpreted the Act as not requiring its approval prior to the construction of yards:

> The applicant correctly states that the construction of a *new yard* and the consolidation of terminal facilities *are not within themselves subject to the jurisdiction of this Commission* and may be accomplished without its authority.

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) (emphasis added). *Accord Terminal Ry. Ala. State Docks — Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978); *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960).

Petitioner's arguments do not require a contrary result. The fact that the Interstate Commerce Act defines "railroad" to include "yard" does not support an interpretation that the phrase "railroad line" includes switching yards. There is a distinction in the statute between "railroad" and "railroad line." *See Long Island R.R. v. New York C.R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960).[14] Petitioner's reasoning simply ignores the significance of the term "line" in the phrase "railroad line," as well as sixty years of judicial and Commission interpretation of that phrase. Furthermore, nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly. [15] It is the

[13] *See* note 9 *supra*.

[14] *See also* note 12 *supra*.

[15] *Cf.* 49 U.S.C. § 11301 (Supp. V 1981) (Commission approval required prior to issuance of certain securities by railroads; Commission required to investigate intended use of proceeds from sale of such securities prior to approval).

purpose, and not the cost, of such projects which determines whether Commission approval is required.

Petitioner contends that his position is supported by several Supreme Court decisions, but we find this reliance to be misplaced. The opinion by Chief Justice Taft in *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 320 (1924), comes the closest to discussing the point at issue, but it is distinguishable on its facts. In *Southern Pacific* the Court held that the Commission was required to give its approval before the City of Los Angeles could require three national railroads to replace their existing passenger stations with a single union station. *Id.* at 347. The plan for the new union station required the three railroads to make substantial *extensions* to their main-line tracks, which, while not great in distance, would "involve a new intramural destination for every railway with important changes in the handling of interstate traffic and passengers" and great expense to change the routes of "the *main tracks* in a crowded city." *Id.* at 346 (emphasis added). These substantial changes necessarily involved the abandonment by the three railroads of the main-line tracks that previously served their old depots and the *extension* of their main lines to the new terminal as ordered by the California State Railroad Commission at the request of the City of Los Angeles.

The project considered by the Court in *Southern Pacific* is clearly distinguishable from the Pointe Coupee Classification Yard because, as the Commission found, "the proposed [classification] yard is *not a line of railroad or an extension of a line* within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation." *Nicholson v. Missouri Pacific R.R., supra,* 366 I.C.C. at 74 (emphasis added) (footnote omitted). This factual description of the classification yard leaves the Commission without jurisdiction over the proposed construction. *See* 49 U.S.C.

§§ 10901(a), 10907(b)(1) (Supp. V 1981). The absence of any change in, or *extension* of Missouri Pacific's main-line track, distinguishes its classification yard project from the union station project and associated new main lines that required Commission approval in *Southern Pacific*.[16]

III.

Missouri Pacific's proposed classification yard will be *incidental* to the operation of its existing main-line track

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[16] The other cases upon which petitioner relies are similarly inapposite and do not require a different result than we reach: L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295, 303-04 (1940) (interest of merchant at market in Kansas City, Missouri was not sufficiently affected to give him right to enjoin construction of an extention of track by the Union Pacific Railroad to a new competing market in Kansas City, Kansas where such extension did not constitute a material change in the railroad's transportation system); Texas v. United States, 292 U.S. 522, 528-35 (1934) (Commission was empowered under the Emergency Railroad Transportation Act of 1933, in the interest of economy, to authorize lease of one interstate railway to another and to permit lessee to abandon or remove the general offices and shops of lessor even though such abandonment or removal was prohibited by the law of the state of lessor's incorporation in which such offices and shops were located); Piedmont & N. Ry. v. ICC, 286 U.S. 299, 303-05, 308-12 (1932) (electric line carrier that proposed to build two *extensions* of 53 and 73 miles respectively was not exempt from the requirement of obtaining a certificate of public convenience and necessity for such construction as a "street, suburban, or interurban electric railway" under section 1(22) of the Interstate Commerce Act where its track on city streets was only 2.9 miles – 2.25 percent of its total track – and its business was pre-eminently interchange, interstate freight traffic of national character in all respects conducted the same as the business of steam freight carriers in the territory served); Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 276-79 (*see* discussion at p. 8 *supra;* new 7.5 mile track intended to serve *new territory* currently being served by a competitor constitutes an *extension* of railroad within the meaning of the Transportation Act of 1920, and is not a spur or industrial track).

that runs through Pointe Coupee Parish, Louisiana. It does not involve any change in or extension of its main-line track and it qualifies as "switching" tracks that are specifically excluded by section 10907(b)(1) from the authority of the Commission under section 10901(a). Accordingly, the provisions of section 10901(a) do not require that Missouri Pacific obtain Commission authorization in order to construct said yard. The decision of the Commission so holding and dismissing petitioner's complaint against Missouri Pacific is therefore affirmed.

Judgment accordingly.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided February 11, 1982

The construction of a classification yard is exempt from Commission regulation pursuant to 49 U.S.C. 10907(b)(1). Complaint dismissed.

Fritz R. Kahn, John R. Long, and *Thomas E. Acey, Jr.,* for complainants.

William R. McDowell, R. H. Stahlheber, and *John P. Legendre* for defendants.

Louis D. Curet, John J. Rademacher, and *Larry LeJeune* for intervenors.

DECISION

By the Division:

In a decision served September 15, 1981, Review Board Number 3 dismissed as premature a complaint alleging that the Missouri Pacific Railroad Company (MoPac) had violated 49 U.S.C. 10901 by constructing a line of railroad without Commission approval. A joint appeal was filed by complainants[1] and petitions for leave to intervene were filed

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[1] Jerry K. Nicholson, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co.

by several parties.[2] We are denying the joint appeal and affirming the previous decision on different grounds.

FACTS

Complainants are owners of certain tracts of land located near Livonia, in Pointe Coupee Parish, LA, over which MoPac owns a right-of-way for the operation of a single-line track of railroad. Complainants allege that MoPac seeks to expropriate portions of their property to construct a classification yard. The yard will be approximately 19,217 feet long and 2,000 feet wide, and will be located along one side of, and adjacent to, the main line of MoPac's Alexandria subdivision. It will be built on 555.625 acres in a rural, agricultural area.

To obtain the land needed for the classification facility, MoPac has filed an eminent domain civil action in Pointe Coupee Parish. Complainants urge that MoPac has never sought nor received a determination by this Commission under 49 U.S.C. 10901 authorizing the proposed construction. They argue that section 10901 expressly includes a yard as being embraced within the meaning of the term "railroad line" as used in section 10901,[3] and point to 49 U.S.C.

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[2] The Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation request intervention to present testimony if the Commission holds a hearing on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint, no purpose would be served in permitting these parties to intervene. Accordingly, the requests are denied.

[3] Section 10901(a) reads, as follows:

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title may –

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

10102(19)(C) which defines a "railroad" as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." Their conclusion is that section 10901 expressly requires MoPac authorization from this Commission prior to the prosecution of an eminent domain proceeding.

The board dismissed the complaint on the grounds that it was premature. The board stated that an application is ripe for Commission review when there is either a binding agreement between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is ready and able to take an action requiring Commission approval. See *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan* (not printed) decided May 6, 1981. The board found that before MoPac can begin to construct its proposed classification yard on complainants' land, it must first be victorious in the pending civil action. Because a civil decision against MoPac may moot the issue of whether Commission approval of the construction is required, the board concluded that the complaint was premature and dismissed it.

DISCUSSION AND CONCLUSIONS

Section 10901 provides that a rail carrier can "construct an extension to any of its railroad lines," or "construct an additional railroad line," only if the Commission certifies that the present or future public convenience and necessity require or permit the construction. MoPac has neither

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(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

sought nor obtained Commission certification of its project. Accordingly, the only issues before us are (1) whether "construction" within the meaning of section 10901 has occurred; and (2) if so, whether it involves construction of "an extension to" or an "additional railroad line."

Construction. — The board found that the bringing of a condemnation proceeding does not constitute "construction" within the meaning of section 10901. We cannot agree.

First, the board's finding would effectively deprive complainants of a forum in which to determine our jurisdiction over the proposed project. As demonstrated by complainants, Commission approval of a proposed construction must be obtained far enough in advance of a railroad's commitment so that the Commission will have time to review and evaluate the operational, financial, and environmental effects of the proposal. Here, MoPac has clearly stated its belief that no Commission approval is required and it is apparent that MoPac intends to commence construction as soon as the land is condemned. Accordingly, if we do not take jurisdiction now, construction would begin and complainants' property confiscated and damaged before we could determine whether the project was within our jurisdiction and if so, whether it should be approved. Failure to review the matter prior to the condemnation of complainants' land would be particularly unfair since complainants have no other forum in which to raise this issue. See 49 U.S.C. 11701(b). It is clearly appropriate to examine the merits of the complaint.

Second, the board's decision is contrary to the only decision directly on point. In *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), a railroad had begun condemnation proceedings in state court to obtain right of way for a proposed extension. No Commission approval had been obtained, so a competing railroad filed suit in Federal district court to enjoin the

State court proceeding. The court enjoined proceedings to prevent violation of Federal law which would otherwise occur, finding that:

> [t]here appears to be no serious question that an attempt to condemn lands for the purposes of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes "construction" within the meaning of this statute.

418 F.2d at 393. See also *Gilmore* v. *Sandersville R. Co.*, 149 F. Supp. 725 (M.D. Ga 1955); *Smyth* v. *Asphalt Bell Ry. Co.*, 12 F.2d 14 (5th Cir. 1926). We agree with the court in *Tampa Phosphate* that the condemnation of right-of-way to construct a railroad line is "construction" which triggers the approval requirements of 49 U.S.C. 10901.

The board cited *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan*, served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed) in support of its finding that the complaint should be dismissed as premature. There division 1 dismissed an application for authority to operate a passenger rail service because the service required trackage rights over another carrier which that carrier refused to grant and which, even if they could be obtained, would require additional Commission approval.[4] *Magner-O'Hara* is not determinative here for two reasons. First, under *Tampa Phosphate*, the condemnation proceeding itself is "construction" within the meaning of section 10901; this condemnation proceeding, if begun to construct a railroad line, is itself a violation of the section. Second, failure of the Commission to take action has a substantially different impact here than *Magner-O'Hara*. In that case, no operations could begin — and no party could

[4] A subsequent decision found the entire proposed operation to be outside our jurisdiction.

be harmed — until successful negotiation of and approval of a trackage rights agreement. Here, complainants have shown a substantial probability that if the Commission waits, complainant would be harmed by the challenged conduct before the Commission could determine its legality.

In sum, the bringing of a condemnation proceeding constitutes "construction," and we will review the merits of the complaint.

Railroad line. — The complaint alleges that MoPac is violating the act by constructing an addition to or extension of railroad line without prior Commission approval. MoPac's proposed classification yard is described in the record. The sole question before us, then, is whether construction of this yard might be considered the construction of a "railroad line."

The term "railroad line" is not defined in the act,[5] nor is the legislative history useful in resolving the issue. However, a separate section of the act excludes from the requirements of section 10901 — again without further explanation — all "spur, industrial, team, switching and side track located, or intended to be located, entirely in one State." 49 U.S.C. 10907(b). Accordingly, we must look to case law and to common sense to determine whether a proposed classification yard could qualify as a rail line.

At the outset, we note that there are a large number of classification yards in this country, and many have been

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[5] Complainants argued before the board that "railroad line" must include a classification yard because "railroad" is defined to include "a switch, spur, track, terminal facility, and a freight yard depot, yard, and ground used or necessary for transportation." 49 U.S.C. 10102(19)(C). This argument does not withstand scrutiny; it would imply, for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."

built since 1920 (when we obtained authority over the construction of railroad lines).[6] Yet complainants have cited, and we have found, no instance in which the Commission has found that the construction of a classification yard — or of any other yard — to require Commission approval under section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.

We need not look far to explain why this issue arises so rarely: in the few instances in which it has been raised, yard track has been found clearly exempt. In *Georgia Southern and Florida Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) the court held that construction of a classification yard similar to the yard proposed here was switching track which did not require Commission approval. Similarly, in *Terminal Ry. Ala State Docks — Operation, Mobile, AL*, 354 I.C.C. 747, 749 (1978), division 1 found exempt "certain rail yard properties," which were to be used as "a switching yard and to furnish connection terminal switching." Again, in *Florida E. C. Ry. Co. Petition for Declaratory Order*, 360 I.C.C. 272 (1979), the Commission observed that by contrast [to trackage which is a portion of a railroad line] trackage exempted under former section 1a(a) is characterized by its use "in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee." Cf. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90 (1940).

Complainants cite *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) as holding that trackage should be considered an addition or extension of railroad line if it is an essential part of a continuous through journey in interstate commerce and not merely incidental to a line-haul movement.[7] They urge that the proposed classifi-

[6] See, *e.g.*, the *Railway Age* article cited by complainants in their reply to defendant's motion to dismiss (p. 6).

[7] The court there said: "[I]f there are traffic movements which are part of the actual transportation haul from shipper to consignee

cation yard is to be used as part of the actual transportation haul from shipper to consignee, not merely as incidental to a line haul movement and they rely upon testimony submitted by MoPac indicating that its new yard would enable it to expand its markets and to serve additional shippers.

Complaintants' reliance on *New Orleans Terminal Co.* is misplaced. The court there reviewed not yard trackage, but a side track which was used for the passage of through trains. By contrast, the proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. Compare *Duluth, S.S. & A.R. Co.* v. *Chicago, M., St. P. & P.R. Co.*, 307 I.C.C. 311 (1959). MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation.[8]

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then the trackage over which the movement takes place is a line of railroad, or any extension thereof." 366 F.2d at 165-66.

[8] Complainants appear to argue that the Commission should have jurisdiction over the construction because it is a significant financial undertaking requiring from 40 to $60 million. Congress did not, however, give us jurisdiction over every railroad expenditure. Our jurisdiction over construction is limited to additions to or extensions of railroad lines, which generally occurs when a construction permits a carrier to penetrate a new market. See generally *Texas & P. Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266 (1926). *Chicago Great Western Ry Co.* v. *Illinois Central Gulf R. Co.*, 275 F. Supp. 909 (1967).

We conclude that complainants' appeal, except as discussed above, is without merit and should be denied. The board's dismissal of the complaint is affirmed on the ground that we have no jurisdiction over the proposed construction.

This decision will not significantly affect the quality of the human environment or the consumption of energy.

It is ordered.

1. The petitions for leave to intervene filed by the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation are denied.

2. The complainants' administrative appeal, except as discussed in the decision, is denied.

3. The prior decision of Review Board No. 3 is affirmed.

4. This decision shall be effective when it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham and Taylor. Commissioner Taylor is assigned to this division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided August 28, 1981

On May 22, 1981, a complaint against the Missouri Pacific Railroad Company (MoPac) was filed by Jerry K. Nicholson. The complaint was brought under 49 U.S.C. § 11701 and the Commission's Rules, specifically 49 CFR 1100.26, and alleges a violation of 49 U.S.C. § 10901. On June 3, 1981, the complaint was supplemented to include three additional plaintiffs, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co. On July 23, 1981, MoPac moved to dismiss plaintiff's complaint and supplemental complaint. Plaintiffs filed a reply.

Complainants allege that they are the owners of certain tracts of land located near Livonia in Pointe Coupee Parish, LA, over which MoPac, a rail carrier providing transportation subject to the jurisdiction of this Commission, owns a right-of-way for the operation of a single line track of railroad.

Complainants state that MoPac seeks to expropriate portions of their property to construct a new railroad yard facility and related facilities and appurtenances. To effect this acquisition MoPac has filed and is prosecuting a judicial action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, Civil Action No. 17299, Division B, *Missouri Pacific Railroad Company* v.

Jerry K. Nicholson, Elizabeth Nicholson Fischer and James W. Smither III, as Trustees of the Leonard K. Nicholson Trust; El Tres Petroleum Corporation; and Nick H. Bruckeroff.

Complainants allege that MoPac has never sought nor received a necessary determination by this Commission under 49 U.S.C. § 10901 that the public convenience and necessity permit or require the proposed construction. Complainants accordingly request that MoPac be ordered to cease and desist from taking any further action to construct or to prepare for construction any additional rail lines over the property of complainants.

MoPac states that the proposed new railroad facility is a classification yard that will not serve any new shippers or extend the existing line of railroad into any new territory. MoPac urges that the Commission has never held that a classification yard is a railroad line or a line of railroad, or that Commission approval is required for the construction of a classification yard. MoPac accordingly urges dismissal of the complaint and supplemental complaint.

We believe that the complaint should be dismissed but for a different reason than that advanced by MoPac. An application is ripe for Commission review when there is either a binding agreement reached between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is *ready* and *able* to undertake an action for which Commission approval is required. *Magner-O'Hara Scenic Railway — Operation, — In the State of Michigan,* decisions served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed).

Here, MoPac would like to construct its proposed classification yard on complainants' land but it first must be victorious in a pending and contested civil action. A trial has been set for January, 1982, and indeed a decision (especially if appealed) may be a long way off. A civil decision against

MoPac may totally moot the issue of whether Commission approval of MoPac's construction is required. Accordingly, we believe the complaint is premature.

It is ordered:

1. The complaint and supplemental complaint are dismissed.

2. This decision is effective on the date of service.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1428

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,

Intervenors.

Petition For Review Of An Order Of The Interstate Commerce Commission

Before: Robinson, Chief Judge, Wald, Circuit Judge, and MacKinnon, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Interstate Commerce Commission under review herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 1983

GEORGE A. FISHER
CLERK

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1983.
Opinion for the Court filed by Senior Circuit Judge Mackinnon.